NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-851

	Opinion Delivered MARCH 11, 2009
HARRY HOFFMAN, III APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CV2004-484-3]
V.	HONORABLE GRISHAM A. PHILLIPS, JR., JUDGE
SCHANESTA SUSKIE APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant, Harry Hoffman, III, appeals the circuit court's denial of his motion for a new trial in his unsuccessful cause of action against appellee, Schanesta Suskie, for personal injuries he suffered as a result of a motor-vehicle accident. On appeal, he asserts that a new trial was warranted because the jury was given an improper verdict form that allowed the jury to consider not just damages, but Suskie's liability, even though she admitted liability. Further, he asserts that he was entitled to a new trial based on the jury's failure to award damages. We affirm.

In 2003, Suskie's vehicle struck the rear of another vehicle, causing that vehicle to strike the rear of Hoffman's vehicle. Hoffman testified that after the accident, he hurt a little bit, but he did not seek medical attention. While driving home to Georgia, however, he began to experience back pain. He testified that he later went to Dr. Todd Thompson, a neurosurgeon, for treatment of back pain and numbness, as well as numbness in his lower

extremities. In 2004, Dr. Thompson performed surgery on his back. Hoffman admitted that he had back pain before the accident, but he stated that after the accident, his legs would give out and he had more numbness. Hoffman admitted that he had a motorcycle accident in 1982, which caused multiple injuries to both legs and resulted in the loss of his left leg. He also testified that following the motorcycle accident, his back never really quit hurting. He also admitted that he had back pain before the accident with Suskie, and that in 2002 he had received steroid injections for back pain and was taking pain medication. He also testified that in 2000, he had a neck problem and had a cervical fusion performed.

Dr. Thompson testified that tests showed that Hoffman suffered from spinal stenosis at L4-5 secondary to spondylolisthesis. He performed a laminectomy and fusion at that level. He testified, however, that he did not know if the accident caused the spondylolisthesis. He further testified that some of Hoffman's condition, including the spondylolisthesis, most likely was present before the accident. He concluded that more likely than not, he had a preexisting condition that was exacerbated by the accident.

Dr. Raymond Earl Peeples, an orthopedic surgeon, testified on behalf of Suskie. He testified that he reviewed Hoffman's records and observed that Hoffman suffered widespread degenerative changes at all levels of the spine. He noted no indications of acute trauma to the lumbar spine in the records. He concluded that the spondylolisthesis, stenosis, and degenerative changes predated and were unrelated to the motor-vehicle accident. He opined that Hoffman's surgery was instead related to a progressive degenerative condition.

At the end of the presentation of evidence, the jury was instructed that Suskie

"admitted liability for any damages sustained by Harry Hoffman, which were proximately caused by the occurrence." The jury was then instructed that it "need only decide what those damages are and what amount he should recover," and that Hoffman had the burden of proving those damages. Further, the jury was instructed on the definition of "proximate cause" as "a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred." It was further instructed to fix the amount of money which would reasonably and fairly compensate Hoffman for the damage that was proximately caused by Suskie's negligence.

The court then read two verdict forms to the jury. The first verdict form provided, "We, the jury, decide for plaintiff Harry Hoffman and assess his damages as" and provided blanks for various damage awards. The second instruction read, "We, the jury, find in favor of defendant Schanesta Suskie." After reading the latter instruction, the court inquired of the attorneys whether the second instruction was needed. Hoffman's attorney replied, "No." The court noted, in apparent reference to the first instruction, that the jury could "put zero in all of this." Suskie's attorney acknowledged the point, but said, "[W]e do need that." In response, the court replied, "Okay. If you think so." At the end of the trial, the jury returned the second verdict.

In his motion for new trial, Hoffman asserted that the use of the second instruction was error. The motion was deemed denied. On appeal, Hoffman argues that the submission of the verdict form improperly allowed the jury to consider not just damages, but also Suskie's liability, even though she had admitted liability. We observe that, in addition to other

grounds, a new trial may be granted on grounds materially affecting substantial rights including "any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial." Ark. R. Civ. P. 59(a)(1).

Verdicts should not be set aside if a jury's intentions were capable of ascertainment with certainty. *Fritz v. Baptist Mem'l Health Care Corp.*, 92 Ark. App. 181, 211 S.W.3d 593 (2005). We conclude that there is no basis for Hoffman's assertion the jury considered Suskie's liability. We acknowledge that the jury could have returned the first jury verdict indicating that it "decide[d] for plaintiff Harry Hoffman and assess[ed] his damages" as zero, but instead, the jury was given a separate verdict, which it returned, finding in favor of Suskie. But this does not mean that it considered Suskie's liability. The jury was instructed that Suskie admitted liability for any damages sustained by Hoffman that were proximately caused by the occurrence, and there was no instruction given on the elements of negligence. Given this instruction, by returning the verdict in favor of Suskie, the jury did not consider Suskie's liability, but found that Hoffman failed to prove that he suffered any damages that were proximately caused by Suskie. Although a defendant may have been shown to be negligent (here, liability was admitted), the plaintiff must also prove that he or she suffered damages as a result of that negligence. *Id.* We do not perceive Hoffman's rights as having been materially affected by the giving of two verdict forms, and we accordingly affirm the denial of a motion for new trial on this point.

Hoffman further argues that he is entitled to a new trial because the recovery was inadequate and not supported by substantial evidence. A motion for a new trial may be

granted on the grounds that there was an "error in the assessment of the amount of recovery," or "the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law." Ark. R. Civ. P. 59(a)(5) and (6). When the primary issue is the alleged inadequacy of the damage award, we will affirm the denial of a motion for new trial absent a clear and manifest abuse of discretion. *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997). When a motion for new trial is made on the ground that the verdict was clearly against the preponderance of the evidence, we affirm the denial of the motion if the verdict is supported by substantial evidence. *Id.*

Here, the jury was presented testimony from which they could conclude that Hoffman did not suffer any damages proximately caused by the occurrence. Dr. Peeples testified that spondylolisthesis, stenosis, and degenerative changes predated and were unrelated to the motor-vehicle accident and that Hoffman's surgery was instead related to a progressive degenerative condition. Given this testimony, we cannot say that the circuit court's decision was not supported by substantial evidence or that the circuit court clearly and manifestly abused its discretion in not awarding damages.[1]

Affirmed.

GLOVER and HENRY, JJ., agree.

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[1]As a collateral matter, Suskie argued on appeal that we should dismiss the appeal because the circuit court granted a motion for dismissal with prejudice filed by Hoffman. We decline to do so based on the history and context of the motion and order, which indicate that the dismissal was of the claim of Hoffman's wife.